BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP

ATTORNEYS AT LAW

NEW YORK • CALIFORNIA • ILLINOIS • LOUISIANA

JAMES HARROD
jim.harrod@blbglaw.com
(212) 554-1502

September 9, 2016

Via ECF and E-mail

Honorable Richard J. Sullivan, U.S.D.J.
Thurgood Marshall United States Courthouse
40 Foley Square
New York, New York 10007

Re: *New York Hotel Trades Council & Hotel Ass'n of New York City, Inc., et al. v. Valeant Pharms. Int'l, Inc., et al.*, No. 16-cv-6779-RJS

Dear Judge Sullivan:

We represent the Airconditioning and Refrigeration Industry Health and Welfare Trust Fund ("ACR Trust"), the Fire and Police Health Care Fund, San Antonio ("San Antonio"), and the Plumbers Local Union No. 1 Welfare Fund ("NY Plumbers" and, with ACR Trust and San Antonio, "Intervenors"). We respectfully request a pre-motion conference concerning Intervenors' intended motions to (a) intervene in this action and (b) transfer this action to the US District Court for the District of New Jersey ("DNJ") for consolidation with Intervenors' previously filed actions there alleging essentially the same claims as this action or, alternatively, to stay this action.

ACR Trust and San Antonio filed a class action against Valeant Pharmaceuticals International, Inc. ("Valeant") and Philidor Rx Services, LLC ("Philidor") in May 2016 in the DNJ, where Valeant has its US headquarters; that action is assigned to District Judge Michael A. Shipp. NY Plumbers filed another class action against Valeant and Philidor in June 2016 in the DNJ; it is also assigned to Judge Shipp. Those actions both allege the same RICO class-action claims against Valeant as this action, which was filed in late August 2016, months after Intervenors filed their DNJ actions. All three actions are based on the same conspiracy to fraudulently market Valeant's pharmaceutical products through Philidor and other pharmacies secretly controlled by Valeant, and the actions allege substantially the same class period. Judge Shipp is also presiding over a securities class action against Valeant based on the same alleged fraud as the three RICO actions. In August 2016, Intervenors filed motions in their DNJ actions to (a) consolidate those two actions and (b) appoint their counsel as interim class counsel under Fed. R. Civ. P. 23(g). Those motions are pending.

Intervenors' motion to intervene in this action should be granted as of right because they "claim[] an interest relating to . . . the transaction that is the subject of the action, and [are] so situated that disposing of the action may as a practical matter impair or impede [their] ability to protect [their] interest . . . ." Fed. R. Civ. P. 24(a)(2). Intervenors have filed actions alleging the same RICO claims against Valeant that are alleged in this action, and disposition of this class action would dispose of their claims. And the "existing parties" in this action do not "adequately represent [Intervenors'] interest," Fed. R. Civ. P. 24(a)(2), because Plaintiffs, who were aware of Intervenors' actions pending in New Jersey, can only have filed this action in a strategic effort to wrest control of the RICO claims against Valeant from Intervenors' first-filed actions, and because Defendants are adverse to Intervenors. Intervention as of right under Rule 24(a)(2) is proper where an interested party seeks to transfer an action to a more convenient forum. *See Del. Tr. Co. v. Wilmington Tr., N.A.*, 534 B.R. 500, 510 (S.D.N.Y. 2015). Intervention as of right is also proper because Intervenors are members of the class in this action who "claim[] that their 'representative' does not adequately represent [them]" and therefore "should . . . be entitled to intervene in the action." Advisory Comm. Notes to Fed. R. Civ. P. 24(a).

At a minimum, Intervenors should be permitted to intervene because they "have a claim . . . that shares with [this] action a common question of law or fact," Fed. R. Civ. P. 24(b)(1), and their "participation will helpfully contribute to the Court's understanding and just resolution of the issues in play" concerning transfer of the action, *Del. Tr. Co.*, 534 B.R. at 510. *See In re Chateaugay Corp.*, 127 B.R. 107, 108 (S.D.N.Y. 1991) (granting intervention to argue for transfer). Intervention is also proper under Fed. R. Civ. P. 23(c)(2)(B)(iv) and (d)(1)(B)(iii). "Intervention in class actions . . . should be liberally allowed" due to "the importance of assuring that the class is adequately represented . . . ." Charles Alan Wright, et al., 7B FED. PRAC. & PROC. CIV. § 1799 (3d ed.).

Intervenor's motion to transfer this action to the DNJ should be granted because "[a]s a general rule, where there are two competing lawsuits, the first suit should have priority." *Employers' Ins. of Wausau v. Fox Entm't Grp., Inc.*, 522 F.3d 271, 274–75 (2d Cir. 2008).[1] The Second Circuit "recognize[s] only two exceptions to the first-filed rule: (1) where the balance of convenience favors the second-filed action, and (2) where special circumstances warrant giving priority to the second suit." *Id.* at 275. "[T]he factors relevant to the balance of convenience analysis are essentially the same as those considered in connection with motions to transfer venue pursuant to 28 U.S.C. § 1404(a)" and are discussed below. *Id.* "Special circumstances" apply only where the first plaintiff engaged in forum shopping that amounts to "manipulative or deceptive behavior," or where "the ties between the litigation and the first forum [are] so tenuous or de minimis that a full balance of convenience analysis would not be necessary to determine that the second forum is more appropriate than the first." *Id.* at 276. Here, Intervenors' DNJ filings were not forum shopping because Valeant's US headquarters, which is where the alleged RICO conspiracy was masterminded and principally carried out, is located in Bridgewater, NJ. *See* Complaint (ECF No. 1) ¶28. For the same reason, the action's ties to the DNJ are substantial.

[1] All citations and internal quotation marks in quotations are omitted.

Thus, no "special circumstances" outweigh the first-filed rule.

And the balance of convenience under the first-filed rule and § 1404(a) strongly favors the DNJ. Section 1404(a) "articulates three general issues that should be considered: (1) the convenience of the parties, (2) the convenience of the witnesses, and (3) the interests of justice." *JP Morgan Chase Bank, N.A. v. Coleman-Toll Ltd. P'ship*, 2009 WL 1457158, at *5 (S.D.N.Y. May 26, 2009) (Sullivan, J.). Here, Valeant's US operations are based in the DNJ, and the individual Defendants are officers of Philidor, which is headquartered in Hatboro, PA, near Philadelphia and much closer to the DNJ than to this District. *See* ECF No. 1 ¶¶28–31. Plaintiffs' New York residence merits little weight because this is a nationwide class action. *See In re Collins & Aikman Corp. Sec. Litig.*, 438 F. Supp. 2d 392, 398 (S.D.N.Y. 2006). Thus, the convenience of the parties favors the DNJ. So does the convenience of the witnesses, because most of the important witnesses will be current and former employees of Valeant and Philidor, most if not all of whom presumably are located at the companies' headquarters. The "locus of operative facts" is also in the DNJ, because this is a RICO case based on mail and wire fraud, and "[m]isrepresentations are deemed to occur in the district where the misrepresentations are issued or the truth is withheld, not where the statements at issue are received." *Id.* at 397. The availability of process to compel former Valeant and Philidor employees also favors the DNJ, as it is more likely to be within 100 miles of their residences. *See id.*

Plaintiffs' forum choice merits little weight, because this is a national class action and "the operative facts of this litigation bear little, if any, connection to [this] District . . . ." *Id.* at 398. Not one Defendant is located here, and the fact that Defendants' nationwide fraud that was executed outside this District found some victims here is not a significant connection. *See Fuji Photo Film Co. v. Lexar Media, Inc.*, 415 F. Supp. 2d 370, 375 (S.D.N.Y. 2006) ("Where a party's products are sold in many states, sales alone are insufficient to establish a material connection to the forum"); *Sookhoo v. CRCG, Inc.*, 1992 WL 142034, at *2 (S.D.N.Y. June 10, 1992) (transferring RICO action to district where defendant had its offices and executed fraud). The DNJ is "as familiar with . . . RICO" as this Court, *Ocean Walk Mall LLC v. Kornitzer*, 2001 WL 640847, at *4 n.4 (S.D.N.Y. June 11, 2001), and Plaintiffs' New York law claims are "accorded little weight on a motion to transfer," *Coleman-Toll*, 2009 WL 1457158, at *9 n.6. "[A]bsent transfer of th[is] action[], there will be two litigations in different fora involving the same parties and issues," which "would unquestionably be duplicative and [a] waste of judicial resources." *Id.* at *8. As noted above, Judge Shipp is presiding over the Valeant securities class action based on the same fraud as this action, as well as Intervenors' RICO actions. Thus, "the interest of justice" and "judicial economy" strongly favor transferring this action to the DNJ to be heard by the same Judge who is hearing the first-filed RICO action and the securities action based on the same facts. *Id.*

Respectfully submitted,

/s/ *James Harrod*

James Harrod

cc: Honorable Michael A. Shipp (via fax)
All counsel of record (via ECF)
Brian T. Frawley, Esq. (counsel for Valeant) (via email)